Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1997

SHELL OFFSHORE INC.
Petitioner
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; FERNON GILLIAM
Respondents

and

SHELL PIPE LINE CORP.
Petitioner
v.
LEE H. CAFIERO; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI OF SHELL OFFSHORE INC. AND SHELL PIPE LINE CORP.

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40 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Omnibus Appropriations for Fiscal Year 1996 Act, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321, which precluded the Benefits Review Board, United States Department of Labor, from reviewing any appeal that was pending before it for greater than one year as of September 12, 1996, violated Shell Offshore Inc. and Shell Pipe Line Corporation's rights to due process of the law under the Fifth Amendment to the United States Constitution, by precluding Shell from having a meaningful opportunity to be heard.

LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The named appellants in the court of appeals and the petitioners herein are Shell Offshore Inc. and Shell Pipe Line Corporation. The named appellees in the court of appeals and the respondents herein are Lee H. Cafiero, Fernon Gilliam, and the Director, Office of Workers' Compensation Programs, United States Department of Labor. Shell Offshore Inc. and Shell Pipe Line Corporation are wholly owned subsidiaries of Shell Oil Company.

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Gilliam v. Shell Offshore Inc., Case No. 93-1758 (September 12, 1996)(reprinted in the Appendix at 15a)

United States Court of Appeals for the Fifth Circuit

Shell Offshore Inc. v. Director, Office of Workers' Compensation Programs, 122 F.3d 312 (5th Cir.1997) (reprinted in the Appendix at 1a)

CONCISE STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision in these consolidated appeals on September 24, 1997. Thereafter, Shell filed a timely Petition for Rehearing En Banc on November 10, 1997.[1] The Fifth Circuit denied Shell's Petition for Rehearing En Banc on December 10, 1997.

This Honorable Court has jurisdiction over these consolidated appeals pursuant to 28 U.S.C. §1254.

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[1] The United States Department of Labor is a party to these appeals. Therefore, pursuant to Federal Rule of Appellate Procedure 40(a), Shell had 45 days in which to file its Petition for Rehearing En Banc.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

1. *FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. *OMNIBUS APPROPRIATIONS FOR FISCAL YEAR 1996 ACT*, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321[2]

Provided further, That no funds made available by this Act [Department of Labor Appropriations Act, 1996] may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act [hereinafter "LHWCA"]...that has been

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[2] Only the relevant portion of the Appropriations Act, as concerns the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., is set forth herein.

appealed and that has been pending before the Benefits Review Board [hereinafter "BRB"] for more than 12 months, except as otherwise specified herein: Provided further, That any such decision pending a review by the [BRB] for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the [BRB] on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals: Provided further, That beginning on September 13, 1996, the [BRB] shall make a decision on an appeal of a decision under the [LHWCA]...not later than 1 year after the date the appeal to the [BRB] was filed; however, if the [BRB] fails to make a decision within the 1-year period, the decision under review shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals[.] * * * Beginning on September 13, 1996, in any appeal to the [BRB] that has been pending for one year, the petitioner may elect to maintain the proceeding before the [BRB] for a period of 60 days. * * * If no decision is rendered during this 60-day period, the decision under review shall be considered affirmed by the Board on the last day of such period, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

33 U.S.C.A. §921 (West Supp. 1997).

CONCISE STATEMENT OF THE CASE

Fernon Gilliam filed a claim for compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §901, et seq., against Shell Offshore Inc. Several years later, Lee Cafiero filed a claim for compensation benefits pursuant to the LHWCA against Shell Pipe Line Corporation.[3] Both claims proceeded to formal hearing before two different administrative law judges. Following the issuance of unfavorable decisions, Shell filed timely appeals in each claim with the Benefits Review Board (hereinafter "BRB"), pursuant to 33 U.S.C. §921.[4]

During the pendency of the above appeals before the BRB, the United States Congress enacted the Omnibus Appropriations for Fiscal Year 1996 Act, Public Law 104-134, Title I, §101(d) [Title I], April 26, 1996, 110 Stat. 1321 (hereinafter "Appropriations Act").[5] The Appropriations Act precluded the BRB from expending any funds for the review of any appeal that had been pending before it for greater than one year as of September 12, 1996. 33 U.S.C.A. §921 (West Supp. 1997). After September 12, 1996, the BRB could not expend any funds for review of any appeal pending before it

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[3] For ease of reference, both Shell Offshore Inc. and Shell Pipe Line Corp. will be referred to collectively as "Shell" herein.

[4] Shell filed its appeal in the *Gilliam* claim on June 15, 1993, and filed its appeal in the *Cafiero* claim on June 23, 1994. As of September 12, 1996, the BRB had not rendered a decision in either claim.

[5] The relevant portion of the Appropriations Act, as concerns the LHWCA, may be found at 33 U.S.C.A. §921 (West Supp. 1997).

for one year. *Id.* Congress since has re-enacted the Appropriations Act, thus continuing its affect on the procedural due process rights of those parties appearing before the BRB.[6]

Shell does not seek review of the substantive claims in either of these consolidated appeals in the current Petition for Writ of Certiorari.

ARGUMENT

These consolidated appeals present a compelling reason for this Honorable Court to grant certiorari. The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Honorable Court. Specifically, the Fifth Circuit has sanctioned Congress's denial of due process under the Fifth Amendment of the United States Constitution by denying Shell its statutory and constitutional right to be heard in a meaningful manner. In so ruling, the Fifth Circuit failed to follow its own precedent on the issue of procedural due process under the LHWCA.

This Honorable Court should grant certiorari in these consolidated appeals to consider whether Congress had the right to amend the LHWCA through an appropriations measure and whether the Appropriations Act impinged upon Shell's due process rights.

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[6] *See* Omnibus Consolidated Appropriations Act, 1997, Public Law 104-208, September 30, 1996, 110 Stat. 3009.

A. CONGRESS DID NOT REPEAL SECTION 921 OF THE LHWCA THROUGH THE APPROPRIATIONS ACT

This Honorable Court long ago announced the "cardinal rule" that "repeals by implication are not favored." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189 (1978) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). Congress must express an affirmative showing of an intention to repeal, "the only permissible justification for a repeal by implication [being] when the earlier and later statutes are irreconcilable." *Id.* at 190 (quoting *Mancari*, 417 U.S. at 550). This policy applies "with *greater* force when the claimed repeal rests solely on an Appropriations Act." *Id.* (emphasis in original).

This policy is based on the practicalities inherent in the legislative process. As this Court explained in *Hill*:

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are *lawful and not for any purpose forbidden.*"

Id. at 190. Should the legislators be denied the ability to do so, it would "lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation" and "would flout the very

rules the Congress carefully adopted to avoid this need."[7] *Id.* at 190-91 (emphasis added).

Notwithstanding the above policy, Congress certainly may suspend or repeal a statute through an appropriations measure. *United States v. Will*, 449 U.S. 200, 222 (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). "The whole question depends on the intention of Congress as expressed in the statutes." *Id.* (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)). Should Congress desire to repeal a substantive statute through an appropriations measure, it must do so clearly. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

Finally, "where a later statute 'covers the whole situation of the earlier one and is clearly intended as a substitute', then the later act operates as a repeal." *Foreman v. United States*, 60 F.3d 1559, 1563 (Fed. Cir. 1995) (quoting *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1985) (quotation omitted)).

Congress has not expressed an affirmative showing of an intention to repeal Section 921 of the LHWCA through the Appropriations Act. Nor did Congress cover the "whole situation" of Section 921 in the Appropriations Act. Section 921 of the LHWCA provides, in part:

> The [BRB] shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by a party in interest from

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[7] *See* Senate Standing Rule XVI(4) and House of Representatives Rule XXI(2). *See also United States v. Will*, 449 U.S. 200, 222 (1980).

> decisions with respect to claims of employees under [the LHWCA] and the extensions thereof. ***The [BRB's] orders shall be based upon the hearing record.***

33 U.S.C. §921(b)(3) (emphasis added).

As reflected in the Appropriations Act, *supra*, Congress retained the requirement that the BRB review appeals pending before it based on their merits, *i.e.*, the hearing record. Shell submits that the BRB review is a significant component of the post-deprivation review process statutorily granted in the LHWCA, as discussed more fully below. Congress, through the Appropriations Act, merely placed a time limitation on this due process right. Congress ***did not*** clearly repeal Section 921 of the LHWCA. Further, Section 921 and the Appropriations Act are not irreconcilable. Rather, Congress merely, unconstitutionally, suspended Section 921 for those claims which had not been reviewed by the BRB, and which had been pending before the BRB for greater than one year, as of September 12, 1996.

No legislative history exists concerning Congress's consideration of the Appropriations Act. As such, no support could be located for the proposition that the members of Congress knew what effect the Appropriations Act would have on parties' constitutional and statutory rights before the BRB. Shell submits that it is reasonable to believe that a majority of the members of Congress are not well-versed on the LHWCA and its statutory right to have an appeal reviewed by the BRB on the merits of the claim. Moreover, in the words of this Honorable Court, it would be "absurd" to require each member of Congress to exhaustively review each provision of Appropriations Act prior to approval to

determine the effect the Appropriations Act would have on Section 921 of the LHWCA.

Therefore, while Congress had the right to repeal or suspend Section 921 of the LHWCA through the Appropriations Act (*i.e.*, it could have precluded the BRB from expending any funds to review ***any*** appeal) Congress did not do so in this case. Further, and in the alternative, if it is determined that Congress repealed or suspended Section 921 of the LHWCA, it could not do so in violation of the Fifth Amendment, *i.e.*, an unlawful means or for a purpose forbidden. *Hill*, 437 U.S. at 190.

In this case, Congress ***did*** attempt to use an appropriations act for an unlawful means or for a purpose forbidden - - to deny parties their due process rights to have their appeals reviewed by the BRB on the merits of their cases. The policy against repeals by implication should be applied with great force in this instance, due to the actions taken by Congress through the Appropriations Act. Therefore, this Honorable Court should grant certiorari to review whether Shell's due process rights were violated by the enforcement of the Appropriations Act.

B. CONGRESS DENIED SHELL DUE PROCESS OF LAW BY PRECLUDING THE BRB FROM REVIEWING THESE APPEALS ON THEIR MERITS

1. The Right of Due Process Still Exists in Section 921

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process

Clause of the Fifth . . . Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

> The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time ***and in a meaningful manner***.'

Id. at 333 (emphasis in original)(quotation omitted). Such is the foundation for consideration of any procedural due process inquiry.

Congress, through the Appropriations Act, denied Shell its opportunity to be heard in a meaningful manner. As such, Congress denied Shell its "liberty" and "property" interests protected by the Fifth Amendment of the United States Constitution. By operation of the Appropriations Act, these consolidated appeals were affirmed by the BRB ***not*** on the hearing record, *i.e.*, their merits, but rather, they were affirmed based on the mere passage of time.

Section 921 of the LHWCA provides a substantive right to have an appeal to the BRB reviewed on the hearing record. Congress did not repeal this right, *i.e.*, it still exists for one year after an appeal is filed. Thus, it may be implied that Congress acknowledged the need for post-deprivation review, *i.e.*, due process, at the BRB for at least ***some*** period of time.

The Appropriations Act did not repeal this right; rather, it merely provided a discretionary right to the BRB to delay consideration of the appeal for one year and then affirm the appeal based upon the passage of time. Thus, Congress unintentionally created a ***discretionary right*** of review in the BRB, followed by a mandatory review by the circuit courts.

2. The Fifth Circuit Failed to Follow Its Precedent

In reviewing the need for procedural due process under the LHWCA, and recognizing the potential for an erroneous deprivation of property by administrative law judges, the Fifth Circuit has held that there is a "comprehensive system of review" provided by the LHWCA. This system consists of a full review on the merits by the BRB, followed by a review by the circuit court. *Abbott v. Louisiana Ins. Guar. Ass'n (In Re Compensation Under the Longshore and Harbor Workers' Compensation Act)*, 889 F.2d 626, 631 (5th Cir. 1989), *cert. denied*, *Louisiana Guar. Ass'n v. Abbott*, 494 U.S. 1082 (1990). In recognizing this right, the Fifth Circuit announced that "[t]here is little risk that the BRB and this Court would uphold an erroneous compensation order..." given the comprehensive system expressly provided for in the LHWCA. *Id.* at 632.[8]

Notwithstanding this recognition of a party's due process rights, and without providing any explanation, the Fifth Circuit panel deciding the instant appeals denied Shell's constitutional challenge in two brief paragraphs. Essentially,

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[8] The Fifth Circuit again acknowledged this comprehensive system of review in *Vincent v. Consolidated Operating Co.*, 17 F.3d 782, 786 (5th Cir. 1994)("The LHWCA provides the employer with a meaningful opportunity to be heard during the administrative process. The employer can request a pre-deprivation hearing before an administrative law judge, and can have the ALJ's compensation order ***reviewed by the [BRB]*** and then by this Court.")(emphasis added). Other courts also have recognized the "comprehensive system" of review provided by the LHWCA. *See Kreschollek v. Southern Stevedoring Co.*, 78 F.3d 868 (3d Cir. 1996); *Meehan Seaway Service Co. v. Director, Office of Workers' Compensation Programs*, 4 F.3d 633 (8th Cir. 1993).

the panel held that the mere allowance of a pre-deprivation hearing with an administrative law judge and a post-deprivation review by the circuit court satisfied all due process requirements. However, the panel ignored the Fifth Circuit's precedent on this very issue and, in so doing, failed to distinguish that precedent from these consolidated appeals.[9]

When requested to address this error on reconsideration, the Fifth Circuit panel chose not to do so. Thus, the panel assigned to these consolidated appeals, in essence, overruled a prior panel of the Fifth Circuit without an *en banc* decision. Ironically, the Fifth Circuit panel, in addressing one of the substantive issues on appeal, cited the well-established rule that "only an *en banc* court can overrule or change what a previous panel has held." *Shell Offshore Inc. v. Director, Office of Workers' Compensation Programs*, 122 F.3d 312, 316 (5th Cir. 1997) (citing *Wood v. U.S.*, 863 F.2d 417, 421 (5th Cir. 1989); *U.S. v. Nixon*, 827 F.2d 1019, 1023 (5th Cir. 1987)).

Therefore, this Honorable Court should grant this Petition for Writ of Certiorari to address whether there is, indeed, a "comprehensive system" of post-deprivation review under the LHWCA, whether such a system is required to satisfy a party's due process rights, and whether said rights were violated by Congress by the Appropriations Act.

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[9] The Fifth Circuit panel cited *Bunol v. George Engine Co.*, 996 F.2d 67, 69 (5th Cir. 1993), as improper authority in support of its ruling. The *Abbott*, *supra*, decision was issued ***prior to Bunol***. Thereafter, the *Vincent*, *supra*, decision reaffirmed the reasoning in *Abbott*, with *Vincent* being issued the year ***after Bunol***. Therefore, the Fifth Circuit panel's reliance on *Bunol*, *supra*, alone, was erroneous.

CONCLUSION

Shell respectfully suggests that the enforcement of the Appropriations Act, as concerns the LHWCA's right to a full review of all appeals by the BRB and circuit courts, warrants this Honorable Court's granting certiorari. By upholding the constitutionality of the Appropriations Act, the Fifth Circuit has sanctioned the taking of a property interest of Shell (*e.g.*, payment of compensation benefits) and has significantly hightenend the risk of erroneous deprivations of private interests by administrative law judges in the future.